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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

GLEN M. CLARKE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–5a) is reported at 590 F.2d 765. The opinion of the district court (App. D, *infra*, 8a–10a) is unreported. The opinion of the court of appeals on a previous appeal (App. E, *infra*, 11a–15a) is reported at 529 F.2d 984. The district court's prior opinion (App. F, *infra*, 16a–21a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was entered on January 15, 1979.[1] By order of April 10, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 25 U.S.C. 357 authorizes a state or local government to "condemn" allotted Indian trust lands by physical occupation.

[1] On February 26, 1979, the court of appeals denied Anchorage's petition for rehearing, which did not address the propriety of the court's ruling on the question whether a State may take allotted lands by physical occupation (App. C, *infra*, 7a).

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

The Act of June 30, 1932, 47 Stat. 474, 25 U.S.C. 409a, provides in pertinent part:

> That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance.

The Act of July 18, 1966, 80 Stat. 304, 28 U.S.C. 2415, provides, in pertinent part:

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment. *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued. *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection

(g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with

subsection (g) may be brought within eleven years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

* * * * *

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

STATEMENT

The United States brought this action in the United States District Court for the District of Alaska seeking injunctive relief for an alleged trespass on allotted Indian lands to which the United States holds title as trustee, and seeking also compensatory and punitive damages for the alleged trespass. The land in question is located in the Chugach Mountains, southeast of Anchorage (App.

E, *infra*, 12a). It is allotted to Bertha Mae Tabbytite, an Indian, who intervened in this action as a plaintiff (App. E, *infra*, 12a–13a).[2] The defendants are Glen Clarke, the adjoining property owner who in 1958 constructed a road over Tabbytite's allotment, Clarke's numerous subsequent grantees,[3] and the City of Glen Alps, which took over maintenance of the road in 1961 following its incorporation. The United States brought this action as trustee to close the road after the failure of Tabbytite's efforts, over a period of more than 10 years, to stop trespassers by posting no-trespass signs and blocking the roadway (App. E, *infra*, 13a).

Clarke, his grantees, and the City of Glen Alps defended on the ground that the road was an easement of necessity.[4] The district court accepted this contention and denied injunctive relief, though it awarded Tabbytite $3,500 for past and future trespass damages (App. F, *infra*, 18a–21a). On appeal, the Ninth Circuit reversed, holding that the road was not a way of necessity

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[2] In 1956 Tabbytite filed a homestead application for this land with the Department of the Interior (App. E, *infra*, 12a). Defendant Clarke applied for a homestead on an adjoining parcel in June 1958, and he constructed the road across Tabbytite's land in the late summer of that year (*ibid.*). Clarke and his wife then filed a series of contests within the Department of the Interior challenging Tabbytite's homestead entry (*ibid.*). Although these contests were unsuccessful, they so delayed Tabbytite's homestead patent that in 1966 she elected to abandon her homestead application and take the land as an Indian trust allotment (App. E, *infra*, 12a–13a).

[3] Clark subdivided his property into 40 parcels (App. F, *infra*, 17a).

[4] In the alternative, Glen Alps requested permission to file a condemnation action as a counterclaim. The district court denied this request as moot when it ruled in favor of Clarke and Glen Alps on plaintiffs' motion for injunctive relief (App. F, *infra*, 20a).

because the alleged necessity did not exist when the common grantor—the United States—conveyed the land to Tabbytite (App. E, *infra*, 13a–14a).

On remand, the Municipality of Anchorage, which annexed Glen Alps in September of 1975, contended that the establishment and maintenance of the road, first by Glen Alps and then by Anchorage, constituted a valid exercise of the power of eminent domain under Alaska law, and that the roadway had thus been "condemned" within the authority granted by 25 U.S.C. 357. The district court ruled that Glen Alps, as a third-class city, did not have the power of eminent domain under Alaska law. The court held, however, that the Municipality of Anchorage, a home-rule city, did have the power of eminent domain, and that its maintenance of the road across Tabbytite's property constituted a valid exercise of that power and a condemnation authorized by 25 U.S.C. 357 (App. D, *infra*, 9a–10a). The court concluded that Tabbytite was "relegated to her action for damages from the inverse condemnation" and for the trespass prior to Glen Alps' merger with Anchorage, and accordingly it refused to enjoin the use of the road (App. D, *infra*, 10a).

On appeal, the Ninth Circuit affirmed (App. A, *infra*, 1a–5a), rejecting the government's contention that 25 U.S.C. 357 authorizes a state to take allotted Indian lands only by judicial proceedings, not by physical seizure. The court stated the issue as "whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power," and held that Section 357 "permits a state to take the Indian land by paying compensation in an inverse condemnation action" (App. A, *infra*, 2a). The court reasoned that the property had already been

taken, and that "it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights" (App. A, *infra*, 3a–4a). The court said Congress had directed "that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found," and it saw "no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit" (App. A, *infra*, 5a).

ARGUMENT

The court of appeals' decision that 25 U.S.C. 357 permits state and local governments to take allotted Indian lands—to which the United States retains legal title—by physical occupation, without judicial proceedings, is without precedent in the nearly 80 years since the enactment of Section 357. It is inconsistent with the purpose of the Act as interpreted by this Court and with its language, especially as understood at the time of its enactment. If this decision is permitted to stand, it will have serious consequences for Indian allottees, who are likely to receive a good deal less for their land through compensation for physical takings as of the date of the initial occupation than they would through formal condemnation proceedings. The decision will also have serious consequences for the United States, which holds an estimated 12 million acres of allotted land in trust.[5] In

[5] The most recent estimate was made from data compiled in 1959 and reported in the "Indian Heirship Land Survey", 86th Cong., 2d Sess. IX (Comm. Print 1960), which states that the Secretary then held 12,235,411 acres of land in trust. Although fee patents have occasionally been issued for allotted trust lands, the Department of the Interior informs us that the total has not changed significantly since 1959.

addition, the court of appeals' decision will affect a large number of cases that the United States anticipates filing in the next year before the applicable statute of limitations runs out. This Court should review the court of appeals' decision and reverse it.[6]

1. Section 357, which was enacted as Section 3 of the Indian Appropriation Act of March 3, 1901, permits allotted Indian lands to be "condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned * * *." Although the statutory language states no such limitations, this Court held in *Minnesota* v. *United States*, 305 U.S. 382 (1939), in a unanimous opinion by Mr. Justice Brandeis, that the

[6] Although the court of appeals remanded the case to the district court for a determination of "the date and extent of the taking and the operation of the applicable statute of limitations" (App. A, *infra*, 5a), there is no reason for review by this Court to be deferred. The district court's decision on remand will neither affect the rule of law announced by the court of appeals nor shed any significant light on it. The action here was indisputably brought before the running of the applicable statute of limitations (see n. 15, *infra*). The date of the taking by Anchorage (which the court of appeals assumed to be the relevant date, see note 15, *infra*), is September 1975, when Anchorage annexed Glen Alps and took over the road. All that remains to be determined is the "extent of the taking," *i.e.*, the value of the highway easement across Tabbytite's land at that time. The court of appeals' determination that the United States may not maintain an action for injunctive relief, but is relegated to seeking damages for a taking, is an important and clearcut ruling that controls the further conduct of this case and will be governing law of the Ninth Circuit, within which a very large proportion of the allotted trust lands lie. As such it warrants review by this Court now. See, *e.g.*, *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152–154 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

Act does not authorize suit in a state court and that the United States is an indispensable party defendant to any suit brought in a federal court.[7]

In contrast, the present decision of the court of appeals requires no judicial proceeding at all. The decision allows a state or local government to "condemn" allotted lands under the Act by simply occupying them. There is no requirement "that the state should have filed an eminent domain action prior to the taking" (App. A, *infra*, 3a). Rather, "once the taking has been accomplished by the state" *(ibid.)*, the burden is on the United States and the allottee to sue the state for damages. Where this Court in *Minnesota* v. *United States* found "persuasive reasons why that statute should not be construed as authorizing suit in a state court" (305 U.S. at 389), the court of appeals has construed the statute to authorize a state or local government to take allotted lands without bringing suit in any court.[8]

[7] The Court noted that, in the case of Indian land held in fee with restraints on alienation, "it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party has no binding effect but that the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto." Thus, "[i]n the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands." *Id.* at 386 n. 1.

[8] The court consistently frames the question as whether the United States and the Indian allottee should be *permitted* to bring an action to recover damages for the taking of the allotted land. App. A, *infra*, 3a, 4a, 5a. But the United States and Tabbytite are seeking to bring no such action; they are seeking to enjoin the defendants from occupying the land unless the defendants bring a judicial condemnation proceeding. The question is whether the United States and the allottee are legally helpless to prevent the physical taking and *must* bring an action for damages as their only remedy after the taking has been accomplished.

2. By its terms, Section 357 does not authorize any and all takings of Indian lands, including those accomplished by physical seizure; it provides only that Indian lands may be "condemned" under the laws of the State or Territory where they are located. Whatever may be the current vogue of the term "inverse condemnation," we are aware of no evidence that it had yet been coined in 1901, when Section 357 was enacted—much less that the 56th Congress intended to reflect it in the statutory language. "Condemnation" meant then, as it generally still means today, a judicial proceeding brought by the governmental entity seeking to take the land.[9]

Nothing in the sparse legislative history of Section 357, which was adopted as a floor amendment during the Senate debates,[10] suggests that Congress intended the provision to apply to takings by seizure, rather than by formal condemnation proceedings. Accordingly, the Secretary of the Interior, in a regulation quoted and relied on by this Court in *Minnesota* v. *United States*, *supra*, 305 U.S. at 390 n.7, has interpreted Section 357 as authorizing a taking only by "condemnation suits" in federal court.[11] And as recently as 1970, after the phrase "inverse condemnation" had come into usage, the Congress still used the term "condemnation" to refer only to eminent domain proceedings brought *by* the government; it did not use "condemnation" or "inverse condemnation" to refer to actions brought *against* the government to recover just compensation for the taking of property.[12]

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[9] The contemporary usage is evidenced by this Court's opinions in *United States* v. *Lynah*, 188 U.S. 445 (1903). The Court there held that the federal government's permanent flooding of the plaintiffs' land constituted a "taking" for which damages could be recovered under the Fifth Amendment, but none of the Court's opinions used the word "condemnation" to refer to this taking. On the contrary, the Court's usage consistently distinguished such a "taking" from a "condemnation" proceeding. See *id.* at 462, 467, 468; see also *id.* at 478 (Brown, J., concurring). For usage by this Court in 1947 adhering to the same distinction, see *United States* v. *Dickinson*, 331 U.S. 745, 747–748, 749 (1947).

[10] 34 Cong. Rec. 1448 (1901).

[11] See Regulation 69 1/2 of the Regulations of the Department of the Interior, "Concerning Rights of Way over Indian Lands," 3 Fed. Reg. 985 (1938), which provides:

> As the holder of the legal title to allotted Indian lands held in trust, the United States must be made a party to all such condemnation suits and the action must be brought in the applicable Federal District Court, the *procedure*, however, to follow the provisions of State law on the subject, so far as applicable.

[12] In the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, Congress provided separately for the awarding of litigation expenses to landowners in "a proceeding instituted by a Federal agency to acquire real property by condemnation" (42 U.S.C. 4654 (a)) on the one hand, and in proceedings involving "[c]laims against the United States" (42 U.S.C. 4654 (c)) on the other, describing the latter as proceedings "brought under section 1346(a)(2) or 1491 of title 28, awarding compensation for the taking of property by a Federal agency * * *" (42 U.S.C. 4654(c)). Congress did not refer to the latter proceedings as "inverse condemnation" or "condemnation," and it did not treat them as the functional equivalent of a condemnation action. On the contrary, the congressional policy in Section 4654 seeks to deter the federal government from taking property without instituting condemnation proceedings. Thus, Section 4654(a) provides for the award of costs and attorneys' fees to the landowner in a condemnation proceeding only if the proceeding is abandoned by the United States or if the final judgment is that the federal agency cannot acquire the property, whereas under Section 4654(c) the landowner who is forced to sue for damages for a taking of property by the federal government is routinely entitled to the award of costs and attorneys' fees.

The court of appeals erroneously assumed that a taking by physical seizure was within the reach of Section 357 because it was an "inverse condemnation" permitted by state law. But "inverse condemnation"—that is, taking by seizure or occupation, with the burden placed on the landowner to sue for just compensation—is not a procedure established (or mentioned) by the Alaska statutes governing the power of eminent domain.[13] The phrase "inverse condemnation" is simply a popular description of an action brought by a property owner seeking just compensation for land taken by the government where it appears that the government will not institute condemnation proceedings. See, *e.g.*, *Martin* v. *Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540, 542 n.1 (1964) (en banc), cert. denied, 379 U.S. 989 (1965); *City of Jacksonville* v. *Schumann*, 167 So. 2d 95, 98 (Fla. App. 1964). To say that Alaska law provides for inverse condemnation is to say nothing more than that the Alaska courts enforce the constitutional requirement of just compensation for the taking of property. See *State, Department of Highways* v. *Crosby*, 410 P. 2d 724, 728-729 (Alaska 1966); *Wickwire* v. *City & Borough of Juneau*, 557 P.2d 783, 784 (Alaska 1976).

Significantly, the term "inverse condemnation" refers to the legal action brought against the state to recover compensation (see 6A *Nichols Eminent Domain* § 28.3 (3d ed. 1976))—not to the physical action *of* the state in taking the property. Thus it is not a procedure which the state may choose as an alternative to the institution of a

[13] See Alaska Stat. §§ 09.55.240-09.55.460 (1973).

condemnation proceeding—at least not for the purpose of "condemning" Indian land under 25 U.S.C. 357.[14]

3. The court of appeals erroneously assumed that a refusal to recognize "inverse condemnations" under Section 357 would work to the detriment of allottees, "deny[ing] Indian beneficial owners a cause of action for damages under the guise of protecting their rights" (App. A, *infra*, 4a). The opposite is true. Prior to the decision of the court of appeals, allottees were not deprived of "a cause of action for damages." The United States, as trustee, could bring an action on their behalf for damages for trespass (as it did in this case), as well as for injunctive relief. The court's decision has the injurious effect of depriving the allottee (and the United States as trustee) of the right to sue a state or its subdivision for injunctive relief. It will also have the effect, in many cases, of reducing the award to the allottee, often to the point where it will be insufficient to enable the purchase of similar lands in accordance with congressional policy.

[14] The decision of the court of appeals, with its broad endorsement of "inverse condemnation" as a legitimate alternative to formal condemnation proceedings, may have an impact not limited to the taking of Indian lands. It may encourage governmental entities to dispense with legal proceedings, and place on the landowner the onus of bringing the legal action, in the taking of property generally. Cf. *United States* v. *Dickinson*, 331 U.S. 745, 747-749 (1947). So far as the eminent domain power of the federal government is concerned, Congress has sought to deter such a course through the litigation-expense provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654 (see note 12, *supra*). In view of that congressional policy, it would be anomalous to construe 25 U.S.C. 357 as allowing state and local governments to use nonjudicial takings with impunity against Indian lands to which title is held by the United States.

The facts of this case illustrate the latter point. Respondents claim that the taking occurred either in 1961, when Glen Alps began to maintain the road across Tabbytite's land, or (if the district court is correct in its conclusion that Glen Alps lacked the power of eminent domain) in 1975, when Anchorage annexed Glen Alps and took over the road's maintenance. Under respondents' theory, Tabbytite is entitled to an award for the value of her land at the time one city or the other took possession. *United States* v. *Dow*, 375 U.S. 17, 21–22 (1958). Given the escalation of real estate values, an award for the 1961 or 1975 value of Tabbytite's property—which is located in a rapidly developing area on the outskirts of Anchorage—will be (even with interest) only a fraction of the property's present value, which would be the measure of just compensation if formal condemnation proceedings were instituted today.

Nor is this situation uncommon. If takings-by-occupation of Indian lands are allowed, there will frequently be significant delays between the initial occupation and the ultimate legal proceeding, and hence significant discrepancies in the compensation recoverable. The United States and the allottee may be unaware of the encroachment when it first occurs, or the allottee may be trying, as Tabbytite was, to stop what he views as a trespass. And delays may continue even after suit is filed. Any legal issue, such as the question here of whether a particular entity has the power of eminent domain under state law, may further delay the ultimate award to the allottee, with the consequence of decreasing its real value.

The net result in a case such as this, where the roadway has already been in place for more than 20 years, is

that the ultimate award to the allottee, based on the value at the time the state or local government took possession, will be only a fraction of the current cost of equivalent land. The consequence is that the policy of the Act of June 30, 1932, 25 U.S.C. 409a—which authorizes the Secretary to reinvest the allottee's condemnation award in other lands—will be frustrated, since it will not be possible to purchase equivalent lands for the amount of the award. See *Minnesota* v. *United States*, *supra*, 305 U.S. at 388 & n.4.

4. The court of appeals' decision imposes a substantial burden on the United States, as trustee, to discover and challenge action that may constitute a taking of allotted lands. The court dismissed the government's concern on this score with the comment (App. A, *infra*, 5a) that "if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government." The court's assumption is incorrect. As we have noted (*supra*, page 9), there are approximately 12 million acres of allotted trust lands. This Court has recognized the " 'almost staggering problem' " the United States faces "in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments." *Poafpbitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968), quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess. 23 (1952).

Prompt discovery of all trespasses by state or local governments (or other entities with the power of eminent domain) would not be a simple matter. Many allotments are in remote areas. There is no requirement that the allottee reside on the allotted lands or make use of them. Indeed, the lands were originally surveyed by the

government and allotted to eligible Indians who, in some cases, never saw the lands and would have been unable to identify them. Moreover, the combined effect of statutory restrictions on alienation together with descent and distribution provisions has produced increasingly fractionated ownership by non-resident Indians. There will be many cases where the allottees will not be aware of an intrusion that may constitute a taking. The United States could learn of all such intrusions only by instituting a costly and time-consuming monitoring program. And there would still be problems in determining when the intrusion first occurred. Cf. *United States* v. *Dickinson*, *supra*, 331 U.S. at 748.

The difficulty of discovering possible takings is especially troubling in view of the fact that the greater the delay between the date a state takes possession and the date the allottee receives the award, the more inadequate the award will be to compensate the allottee for the present value of the land, or to enable the Secretary to purchase substitute lands to be held for the benefit of the allottee.

5. Permitting state and local governments to take allotted lands by physical seizure or occupation also presents serious problems in connection with the statute of limitations applicable to certain actions brought by the United States as trustee for Indians, 28 U.S.C. 2415, as amended by the Act of August 15, 1977, Pub. L. No. 95-103, 91 Stat. 842. The statute of limitations for all claims by the United States for money damages on behalf of Indians that accrued before 1966 will run out on April 1, 1980. 28 U.S.C. 2415, as amended by the Act of August 15, 1977, 91 Stat. 842. Accordingly, the United States anticipates that within the next year it will be

filing a large number of claims, many of which involve alleged trespasses by entities that may have the power of eminent domain under state law. Unless this Court reviews the ruling in this case, the lower courts will be without guidance on the question whether to treat these cases as trespass actions—where the allottee is entitled to damages and injunctive relief—or as "inverse condemnation" actions, where the allottee is entitled only to the value of the property at the time of the initial occupation.

While the limitation period prescribed by Section 2415(b) clearly applies to trespass claims, the limitations period that would be applicable to so-called inverse condemnation actions is by no means clear. We anticipate that state and local entities will argue that the six-year-and-90-day limit applicable to actions founded on tort or implied contract, 28 U.S.C. 2415(a) and (b), should be applied.[15] If they prevail on this point, Section 2415

[15] The present claim is clearly not time-barred, although the court of appeals remanded the case to the district court to determine "the operation of the applicable statute of limitations" (App. A, *infra*, 5a). It seems clear that under the court of appeals' theory the date of taking by Anchorage was September 16, 1975, when the unified Anchorage municipal government succeeded to the rights, liabilities, and duties of a number of smaller surrounding cities, including Glen Alps, and took over maintenance of the road over Tabbytite's property. Since the United States filed the instant suit in 1969, before the taking, the action would not be time-barred regardless what limitations period, if any, applies. Alternatively, if respondents ultimately succeed in overturning the district court's ruling (which the court of appeals did not consider; App. A, *infra*, 2a n.1) that Glen Alps lacked the power of eminent domain, then the taking occurred in 1961 when Glen Alps was incorporated and began to maintain the road. The 1969 action would still have been timely under 28 U.S.C. 2415, since, as noted above, the limitations period for pre-1966 claims has been extended to April 1, 1980.

would, in essence, create a six-year period in which the state could, by adverse possession, divest title held by the United States as trustee. That result would directly contravene Congress's intent that "no one can acquire title to Government property by adverse possession," which is expressed by the provision in Section 2415(c) that there is no limitation period for the government's "bringing an action to establish the title to, or right of possession of, real property." See S. Rep. No. 1328, 89th Cong., 2d Sess. (1966); cf. *Texas* v. *Louisiana*, 410 U.S. 702, 714 (1973). The result of the court of appeals' holding in this case that the United States as trustee is not entitled to bring a suit for possession, but is relegated to an action for damages, may be the frustration of this carefully crafted exception to the statute of limitations established in Section 2415.

A further problem may arise if the statute of limitations in Section 2415 is applied to "inverse condemnation" actions brought by the United States on behalf of an allottee. Section 2415(f) provides that there is no limitations period applicable to counterclaims by the United States. As long as state and local governments must bring condemnation actions to acquire title to allotted lands, the United States will be able to counterclaim for damages for any earlier trespass, without regard to any statute of limitations. But if state and local governments may take possession of allotted lands they wish to acquire and then wait for the allottee and the United States to discover the encroachment and bring an "inverse condemnation" action for damages, they will have a substantial financial incentive to follow this course, since the six-year limitations period may run on any damage claims by the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

SARA SUN BEALE
Assistant to the Solicitor General

CARL STRASS
Attorney

MAY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

GLEN M. CLARKE, et al., No. 77-2571
Appellees,

OPINION

Appeal from the United States District Court
for the District of Alaska

Before: WRIGHT, KENNEDY, and TANG, Circuit Judges.

KENNEDY, CIRCUIT JUDGE:

The United States filed this trespass suit as the owner in fee title of property held in trust after its patent to an Indian by allotment. *See* U.S.C. §§ 331–332. A complete background of the case is set forth in our earlier opinion, *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976). The dispute concerns a road that was built on property of the Indian owner by a private party. The private owner's interest in the road later was transferred to a political subdivision of the State of Alaska.

In this phase of the proceedings, the United States sought an injunction against use of the road, claiming

that the State of Alaska or a political subdivision may not acquire an interest in Indian lands held in trust except by eminent domain and that an injunction should be granted until eminent domain proceedings are commenced. The trial court denied the injunction, reasoning that the land had been the subject of an inverse taking and that the public has the right to use the road after its acquisition by this means, the property owner being limited to an action for compensation resulting from inverse condemnation. The court granted partial summary judgment and denied injunctive relief, and the latter ruling is the subject of this appeal.[1]

A state is allowed by federal statute to take Indian land by condemnation, 25 U.S.C. § 357. The sole issue on appeal is whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power. We agree with the district court that the statute permits a state to take the Indian land by paying compensation in an inverse condemnation action.

The statute in question provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damaged shall be paid to the allottee." The argument of the Government that the statute does not include inverse takings is based princiaplly on *Minnesota v. United States*, 305 U.S. 382 (1939). There the Supreme Court held that the United

[1]The appellees seek review of the district court's denial of an earlier motion for partial summary judgment. Assuming the order was an appealable one, a timely notice of appeal was not filed. Therefore, the propriety of this order will not be addressed.

States is an indispensable party in state actions to condemn any trust property and that such actions must be brought exclusively in the federal courts. We think that case is simply inapposite to the issue before us. There was no occasion there for the Court to consider the propriety of inverse condemnation suits, since the eminent domain action was instituted by the state. The reason for requiring the condemnation suit to be heard in a federal court is irrelevant to whether the United States may, on behalf of the Indian owner, maintain an inverse condemnation action. The Court noted that Indian land under trust allotment is a subject within the exclusive control of the federal government, and that "the judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts." *Id.* at 389 (footnote omitted). Whether the proceeding is for inverse condemnation or for eminent domain, the federal court may maintain control over the action to comply with the policies of *Minnesota*.

We think once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the grounds that the state should have filed an eminent domain action prior to the taking. As the Alaska Supreme Court noted in an analogous situation:

> The property has already been taken. It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be de-

termined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

Department of Highways v. Crosby, 410 P.2d 724, 729 (Alaska 1966).

The Government argues that the statute permitting condemnation should be limited to direct condemnation to avoid clouding title to trust lands, thus increasing protection for Indian allottees. It suggests that such clouding will occur any time the state or a political subdivision trespasses upon the property as, such as in this case, by building a road across it. We do not think this is a persuasive reason for accepting such limited interpretation of the statute. To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing inverse condemnation suits will encourage states and political subdivisions to act with more circumspection, not less, when governmental activities conflict with ownership rights of Indian trust lands. And our holding certainly does not prevent the United States and the allottee from seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass of a private or public entity.

The United States further contends that our holding will require it to make frequent and expensive inspections of these lands for possible acts of inverse condemnation. We think, however, that if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government.

Congress has declared that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found. We see no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit.

There appear to be unresolved questions in this case, including, among others, the date and extent of the taking and the operation of the applicable statute of limitations. These matters remain before the lower court. We hold only that section 357 of 25 U.S.C. does not preclude actions against states or their political subdivisions, according to the law of the state, for inverse condemnation. Accordingly, it does not appear that the plaintiff will prevail in its prayer for injunctive relief and the district court was correct to deny the injunction pending the suit.

The order denying the injunction is affirmed and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

GLEN M. CLARKE, ET AL.,
Appellees

DC# A-69-69
No. 77-2571
No. 77-3469

January 15, 1979.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the District of Alaska and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is affirmed and the case is remanded for further proceedings.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

GLEN M. CLARK, et al.,
Appellees,

No. 77-2571

OPINION

Appeal from the United States District Court for the District of Alaska

Before: WRIGHT, KENNEDY, and TANG, Circuit Judges.

The petition for rehearing is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

BERTHA MAE TABBYTITE,
Intervenor,

No. A-69-69

GLEN M. CLARKE, et al,
Defendants.

CIVIL

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on the Municipality's second motion for partial summary judgment. The issue presented is whether the use of plaintiff's land without the benefit of formal condemnation proceedings is proper under the theory of inverse condemnation to comport with 25 U.S.C. §357. As the court holds that such a condemnation sufficiently fulfills the mandate of that statute it need not reach several other issues raised by the motions.

The facts of the case show that the Municipality of Anchorage as successor in interest to the City of Glen Alps has used a portion of the plaintiff's land for public purposes. This use has taken place without the benefit of formal condemnation proceedings. The plaintiff seeks, *inter alia*, an injunction which will prohibit such use

until a formal condemnation has occurred. The Municipality asserts that plaintiff's right to sue for inverse condemnation precludes such an injunction.

The court first turns to the statutory authority for the Municipality's claim of inverse condemnation. 25 U.S.C. §357 states:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned. . . . ."

The Municipality contends that a taking without formal condemnation proceedings is a proper condemnation in Alaska and may be utilized under this statute. It is clear from the wording of the statute that state law is to govern the propriety of the condemnation proceedings. *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959). Under Alaska law the acts of the Municipality were in the nature of inverse condemnation. *State, Department of Highways v. Crosby*, 410 P.2d 724, 728–29 (1966). It is well settled in Alaska that a taking under such circumstances is a proper exercise of the power of eminent domain and that only the failure to provide just compensation is unlawful. *Id.* at 728, *see also* 6A, *Nichols on Eminent Domain*, §28.3, p. 28–84. The remedy of an injunction, therefore, is barred as the suit for damages is exclusive. *Id.* at 728–29; *Wickwire v. Juneau*, Ak. Sup. Ct. Slip op. at 3 (December 6, 1976); *see also Nichols, supra* at 28-85. Such a construction is consistant with the apparent intent of this statute which puts Indian lands on the same footing as other lands with respect to condemnation proceedings.

The plaintiff's assertion that *Minnesota v. United States*, 305 U.S. 32 (1939) requires a formal condemna-

tion proceeding is not well taken. The issue in that case was a narrow jurisdictional question and the rationale is not applicable to the present action.

Although the plaintiff is relegated to her action for damages from the inverse condemnation she is also entitled to her common law trespass damages for the use of the land prior to unification. *Cf. Nichols, supra*, at 28–74 & 28–80.

Accordingly, IT IS ORDERED.

THAT defendant's motion for partial summary judgment is granted.

DATED at Anchorage, Alaska, this 7th day of April, 1977.

JAMES A. VON DER HEYDT
United States District Judge

cc: United States Attorney
Municipal Attorney
Bertha Mae Tabbytite, Vincent Vitale
Randall E. Farleigh
J.L. McCarrey, Jr.
Albert Maffei
Croft, Thurlow and Loutrel
Hughes, Thorsness, Gantz, Powell & Brundin

APPENDIX E

529 FEDERAL REPORTER, 2d SERIES

UNITED STATES of America,
Plaintiff-Appelant,

and

Bertha Mae Tabbytite,
Plaintiff-Intervenor,

v.

Glen M. CLARKE, et al.,
Defendants-Appellees.

No. 74-1659

United States Court of Appeals,
Ninth Circuit

Feb. 4, 1976.

OPINION

Before DUNIWAY, TRASK and SNEED, Circuit Judges.

DUNIWAY, Circuit Judge:

The United States, joined by Bertha Mae Tabbytite as an intervenor, brought suit to enjoin the defendant class from trespassing on land patented to Tabbytite, an Indian, under 25 U.S.C. §§ 331–32 as an Indian trust allotment, and to recover compensatory and punitive damages for trespass upon that land from 1958 through 1969.

The district court denied an injunction, finding that the defendants had an easement implied by necessity across Tabbytite's land, but awarded plaintiffs $3,500 in compensatory damages—$2,000 for past trespasses and $1,500 for prospective trespasses. The United States appeals and we reverse.

Tabbytite's 160 acres of land are located in the Chugach Mountains southeast of Anchorage, Alaska. In November, 1956, she filed a homestead application for the land with the Department of the Interior.[1] A year and a half later, in June, 1958, Glen Clark, the principal named defendant, applied for a homestead on an adjoining 80-acre parcel. To secure access to a public highway, Clarke constructed a road across Tabbytite's land in the late summer of 1958. The district court held that his doing so and using the road was a continuing trespass, for which it awarded damages. It is undisputed that Clarke never obtained a grant of an easement from anyone.

After securing his patent in 1961, Clarke subdivided his property into 40 parcels, most of which he sold before this suit commenced. Tabbytite was not as fortunate. Between 1958 and 1966, Clarke and his former wife filed three separate contests to Tabbytite's patent application. Clarke admitted at trial that he was aware of 43 U.S.C. § 185 which gives a successful contenstant a preference to the cancelled homestead. Although Tabbytite prevailed in these contests, she could not get her patent while the contests were pending. Apparently despairing of ever securing the land via the homestead route, she

[1] Tabbytite first applied for a homestead on this land in 1954. She later abandoned her application, but was permitted to refile in 1956 pursuant to 43 U.S.C. § 182 (1970).

elected to abandon her homestead application and take the land as an Indian trust allotment. However, there was no break in her possession.

During this same period Tabbytite made several attempts to bar those whom she considered trespassers from crossing her property. She posted "no trespassing" signs, and once, in 1967, sought to block the road physically. On this occasion, Clarke told her that Alaska law prohibited the blocking of a public highway and warned that she would be arrested if she persisted. She did not, choosing instead to notify the Bureau of Indian Affairs in Anchorage of her problem. On the advice of the Bureau, the United States, which holds legal title to Tabbytite's trust allotment, filed this action in 1969.

The substance of Clarke's[2] defense is that he has an easement of necessity across Tabbytite's land, and the trial court so held. Clarke cites *United States v. Dunn*, 9th Cir., 1973, 478 F.2d 443, for the proposition that a land patent may include such an implied easement across adjacent land still held by the federal government. *Dunn* is inapplicable here, because Tabbytite's trust allotment is not federal land and was not when Clarke applied for his homestead or when he got his patent. Her entry for purposes of homesteading in 1956 separated the land from the public domain. *Knapp v. Alexander-Edgar Lumber Co.*, 1915, 237 U.S. 162, 166–167, 35 S.Ct. 515, 59 L.Ed. 894. Legal title remained in the government, but as against all except the United States, she was vested with all the incidents of fee simple title when she entered. *United States v. Buchanan*, 1914, 232 U.S. 72,

[2] We refer only to Clarke because all other defendants are his successors in interest. If he has no implied easement, they also have none.

76-77, 34 S.Ct. 237, 58 L.Ed. 511. Clarke's claim to an easement of necessity through the public domain, even assuming it to be meritorious, cannot give him any such right against Tabbytite. *Cf.* 3 Tiffany on Real Property § 793 (3rd ed.).

In the alternative Clarke argues that he is the successor in interest of the United States, and that the United States had retained an implied easement of necessity across Tabbytite's land when she first homesteaded. This argument also must fail. The government never had an easement of necessity over Tabbytite's land.[3] She was one of the first homesteaders in the area. At the time of her entry in 1956, the land which later became Clarke's homestead was not landlocked. Rather, it was a small part of other substantial contiguous federal holdings across which the government could get access to what later became Clarke's homestead. Only after Tabbytite entered were these federal lands transferred to other homesteaders, including Clarke, and to the state of Alaska. No easement of necessity ever arose over Tabbytite's land because, when her parcel was separated from the public domain, the grantor, the United States, retained access to its remaining property, including what later became Clarke's property, across land that it still held. *Cf. Smith v. DeFreitas*, 3d Cir., 1964, 329 F.2d 629, 633–34.

Moreover, if we were to assume that the government had an easement, it never passed to Clarke. Accepting Clarke's contention that *Dunn*, *supra*, supports the

[3] We ignore 48 U.S.C. § 321d, repealed 73 Stat. 146 (1959), which reserved in all Alaska patents a right of way to the United States for public roads and highways. Clarke could have acquired no rights under this section.

principle that a patent may carry with it an implied right of way across federal land, it does not follow that Clarke succeeded to an easement across Tabbytite's trust allotment. As Clarke knew in 1961 when he received his patent, it was then as necessary to cross the land belonging to Tabbytite to reach his homestead as he now says that it is. He could have asked that any easement which his grantor, the United States, possessed be conveyed to him. He did not, and he is not now in a position to ask this court to enlarge the scope of his patent. *See Great Northern Railway Co. v. United States*, 1942, 315 U.S. 262, 272, 62 S.Ct. 529, 86 L.Ed. 836. Any inclination we might otherwise have to assist Clarke is more than counterbalanced by Clarke's highhanded behavior in attempting to take what was not his, and by the existence of Tabbytite's right to an unencumbered title to her allotment. *United States v. Wood*, 9th Cir., 1972, 466 F2d 1385, 1387–88.

As Clarke had no easement of necessity across Tabbytite's land, it follows that his successors in interest have none either.

The judgment is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

and

BERTHA MAE TABBYTITE,
Intervenor,

v.

GLEN M. CLARKE, et al,
Defendants.

No. A–69–69

CIVIL

MEMORANDUM AND ORDER

THIS MATTER comes before the Court on motion of plaintiff United States to reconsider the Memorandum and Order entered by the Court on August 24, 1972.

The objections of the United States are centered on the applicability of the doctrine of equitable estoppel to the facts of this matter. Since that question becomes moot as a result of this memorandum and order, the Court need not rule upon it. The Court grants the motion for reconsideration, vacates the order dated August 24, 1972, and enters the following memorandum and order which shall in all respects supercede that of August 24, 1972.

This class action involving an alleged trespass to Intervenor's land was tried to the court beginning on June 28, 1972. The conflict arose over the building of a road over a small portion of Intervenor's land which was held in trust for her by the United States as an Indian allotment. Following the close of all testimony, the Court, in the presence of counsel of the major parties, viewed the area in question.

Intervenor, an Indian, first filed a homestead entry application in 1956 on the property now held in trust for her as an Indian allotment. During the summer of 1958, defendants Clarke and Baker, at that time being husband and wife, made a homestead entry above Intervenor's land. In August 1958, defendants Clarke and Baker constructed a road through a portion of Intervenor's land in order to gain access to their own homestead. Following certain contests to Intervenor's first homestead entry, Intervenor filed a second homestead entry application. This application also was contested by defendant Clarke, or others. The result was, in 1965, that Intervenor was given her choice of pursuing the second homestead application in contest, or taking the land as an Indian allotment. Intervenor chose the latter course, and on June 2, 1966, the Indian allotment was issued.

During the years since the construction of the road, the Clarke property has been subdivided, and over 40 parcels sold and a number of homes built thereon. On June 8, 1961, an area including the Clarke property became incorporated as a third class city known as Glen Alps. Several business concerns, including Alaska Gas and Service Company, Radio Anchorage, Standard Oil Company, and the Cook Inlet Pipeline Company, have

constructed and maintain communications and other important facilities in the area. Since the construction of the road 11 years before the commencement of this action, and 14 years before trial, both the property owners in Glen Alps and the general public have utilized the road as a means of access to Glen Alps and the entire adjacent area. Testimony indicated that the business concerns noted above would have no other access other than the road in question by which to service their facilities. All private parties owning property in Glen Alps have no other reasonable access other than the road crossing intervenor's land.

It is undisputed that the roadway across Intervenor's property was constructed in August 1958, and that it has been in open and continuous use by the Glen Alps property owners and the general public since that time. Intervenor testified that, through the years, she had erected one or two "no trespassing" signs, but she readily admitted that at no time in any way did she or any person actually block passage of the road.

The United States and the Intervenor strongly urge that other access routes are available to the public, but the Court finds no convincing evidence whatsoever that this is true. In fact, the opposite is found to be true—that the route taken by Clarke at the time of road construction in 1958 was the only practical one available at reasonable cost for year-round access. In short, the Court finds the road to be a way of necessity.

Plaintiff, United States and intervenor both seek equitable relief in the form of a permanent injunction against defendants, together with an award of compensatory and punitive damages caused by the alleged trespasses.

The Court recognizes the existence of a continuing trespass on Intervenor's land. The Court further recognizes the desirability of injunctive relief to abate a continuing trespass. However, under exceptional circumstances, where the hardship suffered by the defendant in complying with injunctive relief substantially outweighs whatever benefit accrues to plaintiff by the grant of injunctive relief, the Court may elect to shape the equitable relief actually granted, and order money damages in lieu of injunctive relief. *Cox v. City of New York*, 193 N.E. 251 (N.Y. 1934). As stated in 1 Pomeroy's Equity Jurisprudence, §237e (1941):

> And in general a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in substitution for such injunction, where the defendant by his acts committed subsequent to the service of process upon him has rendered relief by injunction ineffectual. Indeed, the court has gone farther in awarding damages to a plaintiff bringing a bill in good faith, when equitable relief is impossible, impracticable, or would result in undue hardship. Even though he has not prayed for such relief, the plaintiff, in exceptional circumstances, has been compelled to accept damages in lieu of an injunction.

The Court finds such to be the case here.

Therefore, IT IS ORDERED:

1. THAT plaintiff's motion for permanent injunction is denied.

2. THAT Intervenor's motion for permanent injunction is denied.

3. THAT in lieu of injunctive relief, Intervenor is awarded $2,000.00 compensatory damages for past trespasses and $1,500.00 compensatory damages for prospective trespasses.

4. THAT defendants' motion to add parties to the counterclaim is denied.

5. THAT defendant's motion to amend the counterclaim is denied.

6. THAT defendants' counterclaim in condemnation is denied as being moot.

7. THAT the counterclaim of defendant Alaska Gas and Service Company in condemnation is denied as being moot.

8. THAT all persons are permanently enjoined from blocking or in any way obstructing passage upon the roadway in question.

9. THAT all persons are permanently enjoined from altering the course of the roadway in question in any way or in widening or enlarging the same.

10. THAT normal maintenance work and snow clearance as reasonably required may be done from time to time upon the roadway in question.

11. THAT each party pay its own costs and attorney fees.

12. THAT the motion to dismiss as to the defendant Spendlove is granted.

13. THAT order dated October 19, 1972, is vacated.

14. THAT counsel for defendant Clarke forthwith prepare an appropriate judgment form.

DATED at Anchorage, Alaska, this third day of October, 1973.

JAMES A. VON DER HEYDT
United States District Judge

cc. United States Attorney
Sylvia Short
Albert Maffei
J. L. McCarrey, Jr.
Peter Lekisch
Leroy Barker
Robert Ely
Croft & Bailey
Hughes, Thorsness, Lowe, Gantz & Clark